Supreme Court, U.S.
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No. 88-106

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

OSCAR S. WYATT, JR.,

Petitioner,

v.

GEORGE P. JOUFLAS,
and
PHOENIX PETROLEUM COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OPPOSING WRIT OF CERTIORARI

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September 27, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. ARE ANY OF THE DISTICT COURT'S FINDINGS "CLEARLY ERRONEOUS?"

2. WAS PETITIONER AFFORDED REASONABLE NOTICE AND AN OPPORTUNITY TO BE HEARD, IN COMPLIANCE WITH ANY DUE PROCESS REQUIREMENT, THAT JOUFLAS SOUGHT AN ADJUDICATION OF PETITIONER'S PERSONAL LIABILITY FOR A NOTE WHICH PETITIONER HAD EXECUTED?

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OPINIONS BELOW

The opinion of the District Court is unreported. The United States Court of Appeals for the Tenth Circuit summarily found no factual or legal errors and its decision is likewise unreported.

STATEMENT OF THE CASE

George P. Jouflas (Jouflas) cannot accept the summary of facts contained in the petition. Petitioner, Oscar S. Wyatt, Jr., (Wyatt) ignores the evidence which Jouflas presented at trial and also ignores the fact that the trial judge, after hearing the testimony and observing the demeanor of the witnesses, found the Wyatt witnesses unbelievable. The following factual summary is based upon the evidence and testimony which the trial judge (in a trial to the Court) found credible.[1]

Wyatt personally executed a $900,000.00 promissory note (Phoenix Note) in favor of the First National Bank of Denver, securing the note with a first priority deed of trust encumbering the property sold by Jouflas to Wyatt, i.e., the 4,000 acre Jouflas ranch. Jouflas received a $6,000,000.00 note and a second priority mortgage from Wyatt as part of the sales transaction.

The Phoenix Note and deed of trust required full payment within one year. However, without notifying or obtaining any consent from Jouflas, the bank and Wyatt modified the Phoenix Note and deed of trust. The modifications were part of a willful

[1] A State Court decision involving Jouflas and Wyatt was admitted as an exhibit. That Court also found that Wyatt and his witnesses were not credible. Every trial judge who has observed the demeanor of Wyatt and his associates has concluded that the testimony Wyatt adduces to explain and justify his conduct is not credible and Wyatt's view of the "facts" are merely self-serving statements to support various schemes.

plan by the bank and Wyatt to advance Wyatt's position, to the detriment of Jouflas, relative to Jouflas' then pending State Court litigation with Wyatt. Specifically, the modifications were intended by Wyatt to impede Jouflas' ability to protect his rights as a subordinate mortgage holder in the Jouflas ranch.

Even under the terms of the modified note and deed of trust, Wyatt was obligated to make annual principal payments of $225,000.00, beginning on September 14, 1979. To accomplish the seemingly inconsistent goal of the bank receiving the $225,000.00 principal payment, while still preserving the superficial appearance of a $900,000.00 principal balance, Wyatt sent $225,000.00 to the bank in Fall of 1979 and again in 1980. Both payments were placed in a "noninterest bearing certificate of deposit." The trial judge, however, relied on the exact and unambiguous language of the first document of "assignment" which specified that the $225,000.00 was to be applied to the unpaid principal balance of the note. Wyatt's personal signature appeared below this admission that the funds were to be applied to the unpaid principal. Wyatt's contrary testimony was rejected by the trial judge.

To understand the equities of this case, the trial court's findings, and the trial judge's observation that Wyatt, the bank and Phoenix Petroleum Company were possibly "in cahoots," one must clearly understand the relationship between Wyatt and Mr. Tracy DuBose, the President and owner of 100 percent of the Phoenix Petroleum Company stock. Mr. DuBose, a licensed attorney, had, by 1963, essentially become a one client law practice, that being Coastal Corporation or Wyatt; Coastal being a corporation formed by Wyatt. From 1963 until 1972, Mr. DuBose was an officer of Coastal Corporation and, after resigning as an officer, he remained as a director and continued representing the company until 1979. During this general time period, he was a Senior Vice President in a position called "special counsel to the President, Oscar Wyatt."

After being involved in a series of Court cases for Coastal, representing their interest in cases involving over $2 billion, Mr. DuBose decided in 1978 to quit the practice of law. He then asked Wyatt if Wyatt would give him a line of credit or otherwise help him finance a business activity. Wyatt accommodated and guaranteed a $5 million line of credit for a company formed by Mr. DuBose.

Phoenix Petroleum Company was incorporated in August of 1979 and Mr. DuBose owned 100 percent of its stock. In October of 1979 (after Wyatt's guarantee in favor of DuBose's first company), Phoenix entered into a purchase agreement with Wyatt relative to the 4,000 acre Jouflas ranch, purportedly to acquire the ranch for $800.00 per acre, even though Phoenix was aware of the much greater sale price in the original transaction between Jouflas and Wyatt. This agreement was unsuccessfully urged by Wyatt as the basis for one of his defenses in the Wyatt/Jouflas State Court litigation.

On November 5, 1979, shortly after the October 1979 purchase agreement (Phoenix's favor to Wyatt), Wyatt executed another $5 million guarantee in favor of Phoenix. Mr. DuBose had personally requested Wyatt to execute the guarantee and Mr. DuBose classified this $5 million transaction as "a favor" to him from Wyatt.

During the same general time period, Phoenix paid approximately $1 million to Stephen Wyatt, a 22 year old son of Oscar Wyatt, Jr. A subsidiary of Phoenix had also been paying Carl Wyatt, another son of Oscar Wyatt, $50,000.00 per year, and paid him $550,000.00 in 1983.

In April of 1979, Jouflas had given Wyatt written notice of Wyatt's default under the terms under of a $6,073,994.00 purchase money note owed by Wyatt to Jouflas. Wyatt had never made any payments on this note. Rather than cure the

default, Wyatt induced the bank and Phoenix to aid in his plan to damage Jouflas' interest and Wyatt, Jouflas and the bank embarked on years of State Court litigation. The years of State Court litigation, interrupted by Wyatt's numerous, unsuccessful removal proceedings, and an interlocutory appeal, finally culminated in a trial court decision totally rejecting Wyatt's contentions and finding his evidence unbelievable. The State Court decision was affirmed and certiorari was denied by the Colorado Supreme Court. Jouflas finally reacquired his ranch and the purported Wyatt sale of the ranch to Phoenix went for naught.

It was in light of the above factual background that, in 1981, Wyatt requested that Mr. DuBose buy the Phoenix Note. Phoenix accommodated this request in November of 1981. Prior to Phoenix's acquisition of the note, Mr. DuBose had occasion to review the Jouflas and Wyatt situation and knew of their State Court litigation and that Jouflas' mortgage was subordinate to the deed of trust. Moreover, Phoenix, through Mr. DuBose, knew of the $450,000.00 of noninterest bearing certificates of deposit which were purportedly pledged as collateral for the note and he was aware that if Phoenix purchased the Phoenix Note, Wyatt would receive $450,000.00 from the bank. This was one of the reasons for Phoenix's acquisition of the note, i.e. accommodating Wyatt's desire to acquire $450,000.00.

As part of this note acquisition transaction, Phoenix, through Mr. DuBose, orally agreed with Wyatt that if Phoenix could not acquire the Jouflas ranch by means of the October, 1979 Wyatt/Phoenix purchase agreement, then Phoenix would first proceed against the Jouflas ranch, and not look to Wyatt for collection of any portion of the note. Consistent with this oral agreement, Phoenix thereafter refused to allow Jouflas to acquire the Phoenix Note when Jouflas offered to buy the note. Phoenix then commenced a public trustee foreclosure proceeding against the Jouflas ranch. Jouflas challenged the pro-

priety of the foreclosure and the District Court, while permitting Phoenix to foreclosure, limited the foreclosure to $450,000.00 (plus interest) and subrogated Jouflas to Phoenix's rights against Wyatt relative to the $450,000.00.[2]

Wyatt contended in the District Court that he had expended significant funds relative to the Jouflas ranch, such as the installation of roads. The District Court, however, found the equities contrary to Wyatt's contention, apparently accepting the testimony of George Jouflas that money spent for roads (which did not meet county specifications) did not improve the property but, in reality, damaged the Jouflas ranch by causing a tremendous amount of erosion.

The District Court, after hearing the testimony, resolved the sharp credibility issues in favor of Jouflas. For purposes of this petition, the Court found that Wyatt, before Jouflas, should be responsible for paying the Phoenix Note, a note personally executed by Wyatt and never assumed by Jouflas.

ARGUMENT

I.

ARE ANY OF THE DISTRICT COURT'S FINDINGS CLEARLY ERRONEOUS?"

Findings of a district court will not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). In applying this standard, Jouflas recognizes that Wyatt has questioned the

[2] Based on the alternative grounds of payment or release of collateral to the detriment of a subordinate creditor, the District Court found that Phoenix could only look to the Jouflas ranch (again owned by Jouflas) to collect $450,000.00 of the original $900,000.00 Phoenix Note. Phoenix did not challenge these findings in this Court. Consequently, Jouflas' subrogation right against Wyatt, the signator of the Phoenix Note, was similarly limited to $450,000.00, plus interest, and judgment was entered against Wyatt accordingly

District Court's adoption of certain proposed findings of fact and conclusions of law submitted by counsel for Jouflas.

All parties had submitted proposed findings of fact prior to the Court informing any party regarding the ultimate decision. Moreover, because of factual disputes and credibility issues, Jouflas submitted proposed findings containing Appendices A and B which were alternative findings of fact. The trial judge rejected significant portions of Jouflas' proposed findings by refusing to adopt the alternatives. Likewise, the trial judge rejected the self-serving proposal submitted by Wyatt.

In *Phyllis A. Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 106 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), this court held that even when a trial judge adopts proposed findings verbatim, the findings are those of the trial court and still can only be reversed if clearly erroneous. Additionally, if the district court's account of the evidence is plausible, in light of the record viewed in its entirety, such findings will not be reversed on appeal even if the appellate court is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This deference to the district court's findings applies not only when they rest on credibility determinations but such deference is also appropriate when the findings are based instead on physical or documentary evidence or inferences from other facts.

Sharp and distinct credibility issues existed between Jouflas on the one hand and Wyatt and his friend, on the other hand. Obviously, the trial judge, as finder of fact, did not believe the testimony of Wyatt and his friend, Mr. DuBose. *Phyllis A. Anderson v. City of Bessemer City, North Carolina*, noted the significance of the obvious fact that only the trial judge can be aware of the variations and demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. Findings based upon such evidence can

virtually never be clear error.

All of the District Court's findings in this action are supported by extensive testimony and the exhibits present a coherent and factually plausible story. Conversely, Wyatt put forth a story which was contradictory, implausible and, most importantly, not credible in the view of the trial judge. As a consequence, the Tenth Circuit found no evidence of error and this Court should not be inclined to find the District Court's findings "clearly erroneous." Wyatt fails to demonstrate that the lower court departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

II.

WAS PETITIONER AFFORDED REASONABLE NOTICE AND AN OPPORTUNITY TO BE HEARD, IN COMPLIANCE WITH ANY DUE PROCESS REQUIREMENT, THAT JOUFLAS SOUGHT AN ADJUDICATION OF PETITIONER'S PERSONAL LIABLITY FOR A NOTE WHICH PETITIONER HAD EXECUTED?

The District Court rejected Jouflas' contention that Phoenix must first exhaust collection efforts against Wyatt's millions of dollars of other assets, before Phoenix could look to the Jouflas ranch for satisfaction of any portion of the $900,000.00 deed of trust. The District Court, however, correctly addressed the subrogation rights of Jouflas; rights which arose when Phoenix looked to Jouflas' ranch property for repayment of Wyatt's personal note obligation.

Wyatt first contends that he was not given notice that

Jouflas was pursuing a claim personally against Wyatt (to the extent that Phoenix looked to Jouflas' property for repayment of the Phoenix Note on which Wyatt was personally obligated). This assertion is contradicted by a cursory review of the record.

Contrary to Wyatt's contention, the Complaint itself asserted that "Jouflas is entitled to a personal judgment against Wyatt . . . " and the prayer for relief specifically requested that judgment be entered in favor of Jouflas against Wyatt personally. Additionally, the pretrial order confirmed that Jouflas' fourth claim for relief sought judgment against Wyatt personally. Finally, Jouflas requested a complete adjudication of the rights of all parties relative to the Phoenix Note transaction.

In light of the above pleadings, Wyatt's statement in the petition that no claim had been made against Wyatt on the Phoenix Note is inaccurate. Wyatt was afforded all necessary due process notice of the fact that such a claim was being pursued. The fact that Wyatt did not (or was factually unable) to present any defense to his overdue note, a note he personally signed, is not a violation of any due process requirement. Wyatt received timely notice of the claim and he participated in a full trial. Wyatt was not deprived of any due process of law.

The lower courts correctly addressed the subrogation rights of Jouflas, in view of Phoenix's attempt to look to the Jouflas ranch for payment of Wyatt's personal note obligation. To the extent that Jouflas is compelled, though not personally bound, to pay the Phoenix Note in order to protect his property from foreclosure, Jouflas is entitled to judgment against Wyatt, the original debtor, in the amount of any such funds expended. This proposition is well recognized. See *American Oil Company v. McMullin*, 508 F.2d 1345 (10th Cir. 1975); *Saunders v. Black*, 136 Colo. 417, 318 P.2d 1100 (1958); *Martynes & Associates, No. 1 v. Devonshire Square Apartments*, 680 P.2d 246 (Colo. App. 1984); *Cooley v. Murray*, 11 Colo. App. 241, 52 P. 1108 (1898)

and *Cagle v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). Further support for the general concept of subrogation is also found in *Memphis L.R.R. Co. v. Dow*, 120 U.S. 287 (1887); *Industrial Development Board of Town of Section, Ala. v. Fugua Industries, Inc.*, 523 F.2d 1226 (2nd Cir. 1975); and Sections 4-3-415 (5) and 4-3-604 Colo. Rev. Statutes.

Wyatt places inappropriate reliance upon *Hartford Accident & Insurance Co. v. Colorado National Bank*, 96 Colo. 127, 40 P.2d 254 (1934). This case merely recognized that if Wyatt had established a defense against the Phoenix Note, Jouflas likewise would have no greater rights than Phoenix to recover against Wyatt. However, this case has no applicability to the facts before this Court. The record on appeal is devoid of evidence of any defense by Wyatt relative to the overdue Phoenix Note. Rather, the evidence shows Wyatt's personal execution of the Phoenix Note, the note was in default and Wyatt's liability was clear and uncontested. Absent evidence in the record of any defense on the part of Wyatt, this Court need not address the hypothetical as to what would have occurred, had Wyatt presented evidence of a defense.

Wyatt also cites *State v. Smither*, 290 Or. 827, 626 P.2d 356 (1981). However, that court merely recognized that subrogation ought to be liberally applied for the protection of those who are its natural beneficiaries, e.g. Jouflas.

> Subrogation is a remedy which is highly favored. The courts are inclined to expand rather than to restrict the principal. Although formerly the right was limited to transactions between principals and sureties, it is now broad and expansive, and has very liberal application . . . the principal being modified to meet circumstances of the individual case. 626 P.2d at 359.

Colorado recognizes an analogous liberal application of the doctrine of subrogation.

> [Subrogation] is a creature of equity . . . its purpose is the prevention of injustice and is the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it . . . *Behlem Manufacturing Co. v. First National Bank of Englewood,* 28 Colo. App. 300, 472 P.2d 703, 707 (1970)

The District Court properly applied the doctrine of subrogation as part of its inherent equitable authority to prevent the injustice which Wyatt, the bank and Phoenix sought to impose upon Jouflas. After Jouflas clearly raised the issue of Wyatt's personal liability on the Phoenix Note, in both the Complaint and the pretrial Order, Wyatt was put on notice that the District Court would determine Wyatt's personal liability. Wyatt was afforded all due process rights to present any defense which might have existed relative to his personal liability. The truth of the matter is that Wyatt did not have defense to the Phoenix Note and he made no attempt to present any defense at the trial.

The procedure of entering a judgment against Wyatt, (See Petitioner's Appendix A) with an appropriate limitation upon execution, was a proper exercise of the court's equitable authority. *United States Fidelity & Guarantee Co. v. Maryland Casualty Co.,* 186 Kan. 637, 352 P.2d 70, 75 (1960), recognized subrogation as a viable remedy, even without the prior payment of the full claim of the creditor. See also *Jones v. Jones,* 158 Kan. 196, 146 P.2d 405, 407 (1944) and in dicta *Marley v. Palmyra Bor.,* 193 N.J. Super., 271, 473 A.2d 554, 571 (1983). Finally, *Coronet v. Rice,* 299 Ky. 256, 187 S.W.2d 454, 456 (1945), recognized that in a proper case, calling for the application of the doctrine of subrogation, the surety has an inchoate right to the benefit of that doctrine in case he should eventually be compelled to make payment; to deny him the right to such protection would clearly be unjust and inequitable, as well as encroaching upon the favored principal upon which the doctrine

of subrogation rests.

The carefully and properly worded judgment entered by the District Court in favor of Jouflas and against Wyatt was a proper exercise of the court's equitable jurisdiction in view of the particular facts and circumstances which were established in the record. The Tenth Circuit properly affirmed.

CONCLUSION

Wyatt has presented no basis for this Court concluding that either the District Court or the United States Court of Appeals for the Tenth Circuit has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. To the contrary, Wyatt's petition contains only self-serving recapitulation of Wyatt's testimony, testimony which was properly rejected by the trial judge.

Wyatt's Petition for Certiorari is actually nothing more than a request that this Court re-weigh the testimony and other factual evidence presented at the trial, urging the Court to accept Wyatt's testimony and reject the testimony of Jouflas. This request ignores this Court's clear statement in *Phyllis A. Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 106 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), which noted

> The trial on the merits should be the 'main event . . . ' rather than a 'try out on the road.'

For the reasons set forth above, Jouflas respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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